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No. 93-1001

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

Supreme Court, U.S.
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ALLIED-BRUCE TERMINIX COMPANIES, INC., and
TERMINIX INTERNATIONAL COMPANY,
Petitioners,

v.

G. MICHAEL DOBSON, WANDA C. DOBSON,
STEVEN GWIN and JAN GWIN,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, makes an agreement to arbitrate enforceable, as a matter of federal law, provided that it is part of "a contract evidencing a transaction involving commerce." The question presented here is as follows:

Whether the Alabama Supreme Court correctly held—contrary to the view taken by most state and federal courts—that Section 2 is inapplicable to contracts otherwise involving interstate commerce if the parties did not "contemplate[] substantial interstate activity" at the time of the contract.

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G. MICHAEL DOBSON, WANDA C. DOBSON,
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Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is not yet reported. It is reprinted in the appendix to this petition at 1a-8a. The order of the circuit court is not reported. It is reprinted in the appendix to this petition at 9a.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on August 13, 1993. A timely petition for rehearing was denied on September 24, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> **Validity, irrevocability, and enforcement of agreements to arbitrate**
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1, provides in relevant part:

> **"Maritime transactions" and "commerce" defined; exceptions to operation of title**
>
> . . . "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

STATEMENT

This case involves the construction of Section 2 of the Federal Arbitration Act (the "FAA" or "the Act"), 9 U.S.C. § 2.[1] Section 2, as a matter of federal substantive law, requires enforcement of arbitration agreements in any "contract evidencing a transaction involving commerce." Section 1 of the Act defines "commerce" to include "commerce among the several States" (9 U.S.C. § 1). The Alabama Supreme Court refused to enforce the arbitration agreement in this case, however, on the sole ground that, notwithstanding any *actual* nexus with interstate commerce, the parties had not "*contemplated* substantial interstate activity." Pet. App. 4a (quoting *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 387 (2d Cir.), *cert. denied*, 368 U.S. 817 (1961)) (Lumbard, J., concurring) (*Metro Indus.*).

The arbitration agreement was part of a contract between Steven and Jan Gwin and petitioners Allied-Bruce Terminix Companies, Inc. ("Terminix Service") and Terminix International Company ("Terminix International").[2] The Gwins, residents of Fairhope, Alabama, had previously agreed to a termite protection plan with a local company, but, upon its expiration, they decided "to go with a national company like Termin[i]x." C.R. 1346.[3] Terminix Service is an Arkansas company with offices in Florida, Georgia, Mississippi, Louisiana, Arkansas, Oklahoma, and Texas, as well as in Alabama. C.R. 272-73. Terminix International is a limited part-

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[1] All parties in the court below are reflected in the caption. The only corporate petitioner in this case—Allied-Bruce Terminix Cos., Inc.—has no parent company or subsidiaries.

[2] As we later discuss, the contract was subsequently transferred to respondents Michael and Wanda Dobson pursuant to a contract for purchase of the Gwins' home. *See* page 4 *infra*.

[3] "C.R." refers to the certified record in the Supreme Court of Alabama.

nership with its principal place of business in Memphis, Tennessee. C.R. 281.

The termite protection plan provided for services to be performed by Terminix Service. Terminix International, in turn, guaranteed the terms of the plan. C.R. 281. The contract embodying the plan expressly provided that "any controversy or claim between [the parties] arising out of or relating to the interpretation, performance or breach of any provision of this agreement *shall be settled exclusively by arbitration.*" C.R. 278-79, 280-85 (emphasis added).[4]

The termite protection plan was subsequently transferred to the Dobsons as part of their agreement to purchase the Gwins' home. C.R. 1664-65.[5] In addition, Terminix Service performed a visual inspection of the home, as called for in the sales agreement, to check for active infestation. C.R. 1500-01, 1652-53. Both the termite protection plan and the written report on the visual inspection were presented to the Dobsons at the closing of the sale. C.R. 1652-54, 1673-74.

[4] The full text of the arbitration provision is as follows:

> The Purchaser and Terminix agree that any controversy or claim between them arising out of or relating to the interpretation, performance or breach of any provision of this agreement shall be settled exclusively by arbitration. Such arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the American Arbitration Association before three arbitrators appointed by the American Arbitration Association. The arbitration award shall be final and binding on both parties. Judgment upon such arbitration award may be entered in any court having jurisdiction.

[5] The sales agreement included the following provision:

> SELLER IS TO FURNISH WRITTEN EVIDENCE from a bonded and licensed termite control company that a visual inspection by them indicates the dwelling is free from infestation by wood destroying insects and damage caused by currently active infestation. OLD DAMAGE IS NOT CONSIDERED. The current termite contract, if any, is to be transferred to Buyer at Buyer's expense.

Shortly after the closing, in the course of construction on the home, the Dobsons discovered termites. Although petitioners provided repairs and further treatment, in accordance with the terms of the termite protection plan,[6] the Dobsons were not satisfied. Rather than submit their complaints to arbitration, they brought suit against petitioners in Alabama Circuit Court, asserting claims that petitioners had breached their duties under the termite protection plan and that they had negligently performed the visual inspection. Pet. App. 2a.

Relying on the arbitration clause in the termite protection plan, petitioners sought to obtain a stay of the litigation and an order compelling arbitration. In so doing, petitioners specifically relied upon Section 2 of the Federal Arbitration Act. Petitioners argued that, as a matter of federal law, Section 2 required enforcement of voluntary arbitration agreements and that it preempted contrary state law. Without providing any reason for doing so, the Alabama Circuit Court, in a summary order, denied petitioners' motion. Pet. App. 9a.

The Alabama Supreme Court, likewise, refused to enforce the written arbitration agreement. The court acknowledged that Section 2 of the Act required enforcement of arbitration agreements as a matter of federal law, Pet. App. 2a-3a, but it held that Section 2 did not apply to this case because the required nexus with interstate commerce had not been met. In doing so, the court rejected petitioners' contention that the scope of Section 2—as reflected in the phrase "contract evidencing a transaction involving commerce"—should be broadly construed as "coextensive with [Congress'] commerce power." Pet. App. 3a. Rather, the court opted to apply a more restrictive standard, stating that " '[t]he significant question,

[6] Much of the material and equipment used to treat the home—including the chemical used to eliminate and prevent termites—was purchased outside of Alabama and brought into Alabama for use on the home. C.R. 272-73.

therefore [in determining whether a contract evidences a transaction involving commerce] is not whether, in carrying out the terms of the contract, the parties *did* cross state lines, but whether, at the time they entered into it and accepted the arbitration clause, they *contemplated* substantial interstate activity.'" Pet. App. 4a (quoting *Metro Indus.*, 287 U.S. at 387 (Lumbard, J., concurring)). Applying that test, and finding insufficient evidence that "the parties contemplated substantial interstate activity when they entered the termite bond," Pet. App. 5a, the court determined that federal law did not apply. Pursuant to state policy against enforcement of pre-dispute arbitration agreements, it thus declined to enforce the agreement.

REASONS FOR GRANTING THE WRIT

This case involves an important issue regarding the scope of Section 2 of the Federal Arbitration Act. Section 2—which embodies a "liberal federal policy favoring arbitration agreements" (*Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983) (*Moses H. Cone*))—applies by its express terms to any "contract evidencing a transaction involving commerce." Although most federal and state courts have read this phrase broadly, in keeping with the federal policy, *see, e.g., Foster v. Turley*, 808 F.2d 38 (10th Cir. 1986), the Alabama Supreme Court has taken quite the opposite course, holding that Section 2 applies, not when a transaction *in fact* involves interstate commerce, but only when the parties "*contemplated* substantial interstate activity." Pet. App. 4a (quoting *Metro Indus.*, 287 U.S. at 387 (Lumbard, J., concurring)). In explaining its adoption of this test, moreover, the Alabama court has candidly admitted that its narrow construction "better promotes our strong public policy *against* the use of predispute arbitration agreements." *Lopez v. Home Buyers Warranty Corp.*, No. 1920330, 1993 Ala. LEXIS 818, at *6 n.2 (Aug. 20, 1993) (emphasis added).

This hostile reading of Section 2 is flatly contrary to the principle that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone*, 460 U.S. at 24. Rather than follow *federal* policy, the Alabama court has adopted a narrow view of federal law that reflects *state* policies against arbitration. Moreover, putting aside questions of policy, its construction of Section 2 is almost certainly wrong. As this Court has recognized, Section 2 was enacted pursuant to powers conferred by the Commerce Clause, *see Southland Corp. v. Keating*, 465 U.S. 1 (1984), and nothing in the language of Section 2—or Section 1, which contains a broad definition of "commerce"—gives any hint that Congress meant to exercise only a fraction of that power. Thus, so long as a transaction in fact involves interstate commerce, it seems clear that Congress intended to make agreements to arbitrate as enforceable as any other contract. *See Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1651 (1991).

The decision below also sharpens an unwarranted division among state and federal courts on this issue. As we have noted, most federal and state courts addressing the question have read Section 2 broadly to reach any transaction that has an actual nexus with interstate commerce. *See, e.g., Foster v. Turley; Snyder v. Smith*, 736 F.2d 409, 417-18 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 147 (5th Cir. 1987). Several state courts, however, have applied the same narrow test as the Alabama courts, enforcing arbitration agreements only when the parties "contemplated" that the particular transaction would involve interstate commerce. *See, e.g., Burke County Pub. Schools Bd. of Educ. v. Shaver Partnership*, 279 S.E.2d 816 (N.C. 1981); *Pathman Constr. Co. v. Knox County Hosp. Ass'n*, 326 N.E.2d 844 (Ind. 1975). The unequivocal commitment of the Alabama courts to the latter test—reflected in a series of recent cases, including this one—makes clear that this conflict will not

end of its own accord. *See, e.g., Jackson v. The Terminix International Co. Limited Partnership*, No. 1911842, 1993 Ala. LEXIS 803 (Aug. 13, 1993); *Lopez v. Home Buyers Warranty Corp.*; *Henderson v. Superior Ins. Co.*, No. 1920541, 1993 Ala. LEXIS 812 (Aug. 20, 1993); *Ex parte Jones*, No. 1920249, 1993 Ala. LEXIS 662 (July 16, 1993). Without guidance from this Court, therefore, the application of Section 2 will needlessly vary from jurisdiction to jurisdiction, directly frustrating Congress' intention to establish uniform federal law making arbitration agreements "valid, irrevocable, and enforceable" in all state and federal courts. *See Southland Corp. v. Keating*, 465 U.S. at 15.

I. THE DECISION BELOW IS BASED UPON A MISREADING OF SECTION 2 AND CONTRAVENES FEDERAL POLICY FAVORING ENFORCEABILITY OF ARBITRATION AGREEMENTS.

It is well-established that Section 2 of the Federal Arbitration Act "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone*, 460 U.S. at 24; *see Perry v. Thomas*, 482 U.S. 483, 489 (1987). As this Court has recognized, the purpose of Section 2 "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. at 1651. Drawing upon its "comprehensive powers" under the Commerce Clause, *Southland Corp. v. Keating*, 465 U.S. at 15, Congress sought to "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24. Within the fields that it encompasses, therefore, Section 2 requires that courts "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

Although this Court has not precisely defined the phrase at issue here—*i.e.*, "contracts evidencing transactions involving commerce"—it has long viewed the term as having broad reach. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), for example, the Court declined to limit application of Section 2 to "contracts between merchants for the interstate shipment of goods," *id.* at 401 n.7, finding no basis for that in either the language or history of the Act. As part of its analysis, the Court specifically noted language in a relevant House Report stating that " '[t]he control over interstate commerce [one of the bases for the legislation] reaches not only the actual physical interstate shipment of goods *but also contracts relating to interstate commerce.*' " *Id.* (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)) (emphasis added).[7] More recently, the Court, again without actually deciding the question, declared that "the Federal Arbitration Act . . . embodies Congress' intent to provide for the enforcement of arbitration agreements *within the full reach of the Commerce Clause.*" *Perry v. Thomas*, 482 U.S. at 490 (emphasis added).

The decision below, however, takes a very different view. Relying on a standard fashioned more than three decades ago—long before this Court made clear the full extent of the federal policy favoring arbitration—the Alabama courts have imposed a requirement that the parties regard their dealings as involving interstate commerce, rather than simply looking to whether the dealings in fact

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[7] Although the Court, in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), held that an employment contract did not evidence a transaction involving commerce, it did so only after finding "no showing that [the employee] while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions." *Id.* at 200-01.

do so. Thus, even though (as in this case) a transaction may involve parties in different states and the movement of goods across state lines—and thus is unquestionably within the reach of Congress' powers under the Commerce Clause—the Alabama courts refuse to apply federal law, unless the parties also "*contemplated* substantial interstate activity." Pet. App. 7a (emphasis added). This limitation on federal law, not coincidentally, allows for greater application of state policies, particularly those (as in Alabama) that disfavor enforcement of agreements to arbitrate.

This reading is directly at odds with both the language and the policies of the Act. The term "transaction involving commerce," on its face, plainly calls for an inquiry into actual interstate activity, rather than the expectations of the parties, and the broad definition of "commerce" in Section 1 likewise points toward application of an objective standard (*i.e.*, whether the transaction involves "commerce among the several States"). While the contract containing the arbitration agreement must "evidence" the transaction involving commerce, as Judge Lumbard noted in his concurring opinion in *Metro Indus.* (287 F.2d at 386), that language, naturally read, means only that the contract must be evidence of the *transaction*, not its interstate nature. Thus, provided that the transaction actually involves interstate commerce, and provided that the contract is evidence of the transaction, Section 2 makes the agreement to arbitrate enforceable, regardless of whether the parties openly make reference to (or otherwise "contemplate") the interstate elements in their contract.

Quite apart from the plain language of the statute, it makes little sense to think that Congress would have favored a narrow test keyed to the subjective "contemplation-of-the-parties." In recent years, for example, this Court has repeatedly rejected arguments that Section 2 is inapplicable to claims arising under federal statutes.

See, e.g., Gilmer v. Interstate/Johnson Lane Corp.; *Perry v. Thomas*; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*; *Dean Witter Reynolds, Inc. v. Byrd.* Noting that Congress intended to promote enforcement of agreements to arbitrate, *see, e.g., Mitsubishi Motors*, 473 U.S. at 627, the Court has observed that "the [Federal Arbitration] Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability." *Id.* By the same token, the Act gives no basis for thinking that Congress would want to limit the field of its application solely on the basis of what the parties understood about the interstate nature of their transaction.

The "contemplation-of-the-parties" test, at bottom, seems to rest upon a confusion of two necessary but distinct elements under Section 2: first, a subjective agreement to arbitrate; and, second, an objective nexus to interstate commerce. The first requirement establishes that there is, in fact, a voluntary agreement to enforce pursuant to Section 2, and the second requirement establishes that the transaction is within the field defined by Congress and within reach of the powers allotted to Congress under the Constitution. It distorts the Act, however, to combine the two requirements into a third requirement: that the parties must "contemplate" the elements necessary to bring the transaction within the terms of the statute. Whether or not that is the case, the parties have *agreed to arbitrate* their disputes, and the sole remaining inquiry is whether Congress, having exercised its power over interstate commerce, has made that agreement enforceable. The contemplation of the parties has nothing logically to do with that question.[8]

[8] There is nothing inherently inequitable about a general rule requiring parties to a contract to abide by their agreement to arbitrate. If a particular agreement resulted from fraud, or any other behavior that would be grounds "for the revocation of any contract" (9 U.S.C. § 2), then federal policy does not require that it be enforced. *Gilmer*, 111 S. Ct. at 1655-56; *Mitsubishi Motors*, 473 U.S. at 627.

The construction given Section 2 by the Alabama courts is almost certainly tied to its "strong public policy against the use of predispute arbitration agreements." *Lopez v. Home Buyers Warranty Corp.*, No. 1920330, 1993 Ala. LEXIS 818, at *6 n.2. That sort of hostility towards arbitration agreements, of course, is precisely what Section 2 was meant to override. *See, e.g., Gilmer*, 111 S. Ct. at 1651. But, whatever the motive, a grudging reading of the Act should not be allowed to stand. If state courts may define Section 2 narrowly, and thus avoid preemption of contrary state policies, the federal policy favoring enforcement of arbitration agreements will be severely undercut. *See Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1119 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990) ("courts must be on guard for artifices in which the ancient suspicion of arbitration might reappear"). For that reason alone, review by this Court is appropriate.

II. THE STATE AND FEDERAL COURTS HAVE ADOPTED DIFFERENT CONSTRUCTIONS OF SECTION 2 CONTRARY TO THE NEED FOR UNIFORM FEDERAL LAW REGARDING ARBITRATION AGREEMENTS.

The issue presented here also has divided state and federal courts. Most courts addressing the issue have held that the phrase "contract evidencing a transaction involving commerce" must be broadly construed, expressly relying on the federal policy favoring enforcement of arbitration agreements. *See, e.g., Snyder v. Smith*, 736 F.2d at 417-18; *Societe Generale de Surveillance, S.A. v. Raytheon European Management & Sys. Co.*, 643 F.2d 863, 867 (1st Cir. 1981); *Foster v. Turley*, 808 F.2d at 40; *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d at 147; *Woermann Constr. Co. v. Southwestern Bell Tel. Co.*, 846 S.W.2d 790, 792 (Mo. Ct. App. 1993). Thus, in the Tenth Circuit, "[t]he requirement that the underlying transaction involve commerce is to be broadly construed *so as to be coextensive with congressional power to regulate under the Commerce Clause.*" *Foster v. Turley*, 808 F.2d at 40 (emphasis added). In the Fifth Circuit, Section 2 applies to any contracts that "*relate to* interstate commerce, a standard that implements the strong federal policy favoring arbitration." *Del E. Webb*, 823 F.2d at 148. Similarly, the First Circuit has declared that "the term 'commerce' in this provision of the Act refers to interstate or foreign commerce and is to be broadly construed." *Societe Generale*, 643 F.2d at 867. *See also C.P. Robinson Constr. Co. v. National Corp. for Housing Partnerships*, 375 F. Supp. 446, 450 (M.D.N.C. 1974) ("the question as to whether the contract evidences a transaction in commerce must be determined by application of the statutory definition of 'commerce' to the objective facts of the case").[9]

Other courts—primarily state courts—have chosen to follow the test applied below. *See Burke County Pub. Schools Bd. of Educ. v. Shaver Partnership; Pathman Constr. Co. v. Knox County Hosp. Ass'n; R.J. Palmer Constr. Co. v. Wichita Band Instrument Co.*, 642 P.2d 127 (Kan. Ct. App. 1982); *Loche v. Dean Witter Reynolds, Inc.*, 526 N.E.2d 1296 (Mass. App. Ct. 1988); *Lacheney v. Profitkey Int'l, Inc.*, 818 F. Supp. 922 (E.D. Va. 1993). This test, fashioned by Judge Lumbard some thirty years ago, holds that the proper inquiry under Section 2 "is not whether, in carrying out the terms of the contract, the parties *did* cross state lines, but whether, at the time they entered into it and accepted the arbitration clause, they *contemplated* substantial interstate activ-

[9] We note that the Alabama courts, at one time, applied a similar standard, holding that Section 2 applied as long as the transaction had the "slightest nexus" with interstate commerce. *See Ex parte Costa & Head (Atrium), Ltd.*, 486 So. 2d 1272, 1275 (Ala. 1986). Subsequently, in *Ex parte Warren*, 548 So. 2d 157 (Ala.), *cert. denied*, 493 U.S. 998 (1989), the Alabama Supreme Court utilized the "contemplation-of-the-parties" test but did not overrule *Costa & Head*. The use of the "slightest nexus" test was then explicitly disavowed this year in *Ex parte Jones*, *supra*.

ity." *Metro Indus.*, 287 F.2d at 387. Contrary to the approach in most jurisdictions, therefore, courts following the Lumbard test expand or contract federal law depending "not on what in fact happened, but on what was in the contemplation of the parties as manifested in their written agreement." *Id.*

This lack of uniformity cannot be squared with the objectives of the Act. Although the different tests will sometimes lead to the same conclusion—that is, facts about a particular transaction may satisfy both tests or neither—often they will not. This Court has said, in holding that Section 2 applies in state as well as federal courts: "We are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." *Southland Corp. v. Keating*, 465 U.S. at 15. Yet, as long as the language of Section 2 means one thing in some courts, and something quite different in other courts, the right to enforce arbitration contracts will continue to depend "on the particular forum in which it is asserted."

This judicial disagreement also goes to the most basic, and delicate, of questions under the Act: whether federal or state law governs the enforceability of an arbitration agreement. This is not a question to which there can be two correct answers. If the majority of state and federal courts is correct, and Section 2 has a broad scope reflecting Congress' powers under the Commerce Clause, then the Alabama courts, and other courts following the "contemplation-of-the-parties" standard, are wrongly applying state law to arbitration agreements that federal law makes enforceable. If the narrower reading is correct, however, then judges in numerous federal and state courts are improperly overriding state law whenever a transaction objectively involves interstate commerce but the parties did

not so contemplate in their agreement. A ruling from this Court would put all courts on the same footing.

Finally, the uncertainty raised by different tests creates obstacles to the conduct of interstate business. Under federal law, businesses engaged in an interstate transaction should be able to rely on an agreement to arbitrate disputes between the contracting parties. But, as matters now stand, the ability to rely on an arbitration agreement may depend on whether the court hearing a lawsuit (brought in violation of the agreement to arbitrate) takes a broad or narrow view of the nexus requirement of Section 2. Indeed, given that interstate transactions by definition involve more than one state, it frequently will be difficult, if not impossible, for businesses to know, at the time that they negotiate contracts, whether agreements to arbitrate are binding or not. This uncertainty is directly contrary to Congress' goal to make arbitration agreements "valid, irrevocable, and enforceable," as a matter of federal law. 9 U.S.C. § 2.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 22, 1993

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APPENDICES

APPENDIX A

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1993

1920473

ALLIED-BRUCE TERMINIX COMPANIES, INC., *et al.*

v.

G. MICHAEL DOBSON, WANDA C. DOBSON, STEVEN GWIN, and JAN GWIN

Appeal from Baldwin Circuit Court
(CV-91-796)

ALMON, JUSTICE.

The defendants, Allied-Bruce Terminix Companies, Inc. ("Terminix Service"), and Terminix International Company ("Terminix International") appeal from an order of the trial court denying their motion to compel arbitration of the tort and breach of contract claims filed against them by Michael Dobson, Wanda Dobson, Steven Gwin, and Jan Gwin. The issue for our review is whether the arbitration clause contained in a termite bond is enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA").

In August 1987, Steven Gwin allowed the termite bond on his house in Fairhope, Alabama, to expire, and he

purchased a replacement bond from Terminix Service. Terminix Service is an Arkansas corporation that does business in several states, including Alabama, Arkansas, Florida, Georgia, Mississippi, Louisiana, Oklahoma, and Texas. The bond was guaranteed by Terminix International, a limited partnership that has its principal place of business in Memphis, Tennessee.

In 1991, Steven and Jan Gwin agreed to sell the house to Michael and Wanda Dobson. The sales contract required the Gwins to provide written evidence from a licensed pest control company that the company had performed a visual inspection of the house and had observed no active infestation of termites or damage from active infestation. The contract also required that the termite bond be transferred to the Dobsons at the closing of the sale. Because of the existing bond on the house, Terminix Service agreed to perform the inspection and to issue the required statement. At the closing, the Gwins furnished Dobson with a standard Veterans' Administration ("VA") form; the V.A. form provided that Terminix Service had observed no visible evidence of active infestation during the inspection.

The Dobsons later discovered termite damage to the house, and they brought an action against the Gwins, alleging fraud, and against Terminix Service and Terminix International, alleging fraud in connection with the representations in the V.A. form, and alleging breach of contract. The Gwins cross-claimed against Terminix Service and Terminix International. Terminix Service and Terminix International moved to stay the proceedings and to compel the Dobsons and the Gwins to submit their claims to arbitration pursuant to an arbitration clause in the bond. The trial court denied this motion, and the defendants appeal.

Predispute arbitration agreements are unenforceable under Alabama law. Ala. Code 1975, § 8-1-41. However, if an arbitration agreement is voluntarily entered into and

is contained in a contract that involves interstate commerce, then the FAA preempts state law and renders the agreement enforceable. *A.G. Edwards & Sons, Inc. v. Syvrud,* 597 So. 2d 197 (Ala. 1992). The Terminix companies contend that, because the United States Supreme Court has held in *Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), that Congress's regulatory power under the FAA is co-extensive with its commerce power, this Court should apply the "slightest nexus" standard first enunciated in *Ex parte Costa & Head (Atrium), Ltd.,* 486 So. 2d 1272 (Ala. 1986), to this situation. This standard provides that if the contract in question has the slightest nexus with interstate commerce, the FAA will apply. *Costa & Head*; *Ex parte Brice Building Co.,* 607 So. 2d 132 (Ala. 1992). Terminix Service and Terminix International argue that, because they are out-of-state entities, and because some of the materials used in fulfilling their duties imposed by the termite bond were brought into Alabama from out-of-state, the bond has at least a "slight nexus" with interstate commerce.

We need not address this argument, however, in light of this Court's decision in *Ex parte Jones,* [Ms. 1920249, July 16, 1993] —— So. 2d —— (Ala. 1993).[1] In *Jones,* we explicitly rejected the *Costa & Head* "slightest nexus" standard in favor of the standard enunciated in *Ex parte Warren,* 548 So. 2d 157 (Ala. 1989), cert. denied, 493 U.S. 998, 110 S.Ct. 554, 107 L.Ed.2d 550 (1989). We held:

> "To resolve any inconsistency or confusion generated by the existence of two different standards, and determining, as we now do, that *Warren* represents a more reasoned approach than the *Costa* standard, we overrule any case inconsistent with *Warren,* to

[1] See also *Continental Grain Co. v. Beasley,* [Ms. 1920241, July 16, 1993] —— So. 2d —— (Ala. 1993).

the extent that it states a different standard for determining the involvement of interstate commerce."

—— So. 2d at ——. The *Warren* standard, which was invoked in *Warren* to cover only the "narrow" circumstances in which Alabama residents had purchased an automobile for consumer purposes from an in-state dealership, was first set forth by Judge Lombard in a special concurrence in *Metro Industrial Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382 (2d Cir.), cert. denied, 368 U.S. 817, 82 S.Ct. 31, 7 L.Ed.2d 24 (1961):

> "The significant question, therefore [in determining whether a contract evidences a transaction involving commerce], is not whether, in carrying out the terms of the contract, the parties *did* cross state lines, but whether, at the time they entered into it and accepted the arbitration clause, they *contemplated* substantial interstate activity. Cogent evidence regarding their state of mind at the time would be the terms of the contract, and if it, on its face, evidences interstate traffic . . . the contract should come within § 2 [of the FAA.] In addition, evidence as to how the parties expected the contract to be performed and how it was performed is relevant to whether substantial interstate activity was contemplated."

287 F.2d at 387 (emphasis in original).

Terminix Service and Terminix International argue that the bond involves interstate commerce even under the more restrictive *Warren* standard. In addition to the evidence cited above in support of their *Costa & Head* argument, the Terminix companies cite the following in support of their contention that at the time they entered into the contract the parties "contemplated substanial interstate activity": Steven Gwin's testimony that he allowed his bond with a local pest control company to expire so that he could "go with a national company like Terminix"; the fact that the bond instrument showed on its face that it was executed in Memphis, Tennessee; and the fact that the bond contained a statement that it was subject to federal regulation.

A brief survey of cases from other jurisdictions that have applied the standard will be useful in determining whether the parties contemplated substantial interstate activity when they entered the termite bond.

Several cases applying the *Warren* standard involve contracts for the construction of large projects. In *Burke County Public Schools Board of Educ. v. Shaver Partnership*, 303 N.C. 408, 279 S.E.2d 816 (1981), the North Carolina Supreme Court held that a contract between a North Carolina school board and an Indiana architectural firm for the construction of school buildings did involve interstate commerce so as to be covered by the FAA. In so holding, the Court stated:

> "We do not mean to suggest that where the contracting parties are merely located in different states or where other facts tending only to show diversity of citizenship are present, the contract must necessarily be found to contemplate substantial interstate activity so as to trigger the act's applicability. Where, however, performance of the contract necessarily involves, so that the parties must have contemplated, substantial interstate activity, the contract evidences a transaction involving commerce within the meaning of the [FAA]."

303 N.C. at 418, 279 S.E.2d at 822. The Court then held that the following evidence established that when they entered into the contract the parties contemplated substantial interstate activity: certain contractual provisions called for the Indiana firm to come to the North Carolina building site for various reasons; accounting records on the project were maintained in Kansas; the Indiana firm dealt with suppliers from across the country in performing its contractual duties; and certain design work was performed by a Michigan firm. See also *G.D. Searle*

& Co. v. Metric Constructors, Inc., 572 F.Supp. 836 (N.D. Ga. 1983); *Dimambro-Northend Assocs. v. Blanck-Alvarez, Inc.*, 251 Ga. 704, 309 S.E.2d 364 (1983); *University Casework Systems, Inc. v. Bahre*, 172 Ind. App. 624, 362 N.E.2d 155 (1977).

Some courts have also held the FAA applicable to contracts for the construction of smaller projects. In *R.J. Palmer Constr. Co. v. Wichita Band Instrument Co.*, 7 Kan. App.2d 363, 642 P.2d 127 (1982), the Kansas Court of Appeals held that the FAA applied to a contract for the construction of a music store. The Court held that because the store was to be built out of California redwood, the parties knew that the contract would involve interstate activity.

A smaller number of cases applying the *Warren* standard involve personal service contracts. For example, in *Bennish v. North Carolina Dance Theatre, Inc.*, 108 N.C. App. 42, 422 S.E.2d 335 (1992), the North Carolina Court of Appeals held that a dancer and his employer contemplated substantial interstate activity when they entered the contract, because the contract provided guidelines on air travel and the employer introduced evidence that the dancer toured outside of North Carolina for a substantial amount of the contract period. See also *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972).

We conclude that the evidence adduced by the Terminix companies does not establish that the parties contemplated substantial interstate activity when they entered the termite bond. Initially, we note that we have held in *A.J. Taft Coal Co. v. Randolph*, 602 So. 2d 395 (Ala. 1992)—which was decided under the *Costa & Head* standard—that it is insufficient for the purposes of invoking the FAA merely to show that one or more of the parties to the contract is located in another state. Therefore, under the more restrictive *Warren* standard, the fact

that the bond stated that it was executed in Tennessee is not determinative. Terminix's second piece of evidence, that the bond stated that it was subject to federal regulation, is based on the following paragraph in the bond:

> "Change in Law. Terminix performs its services in accordance with the requirements of federal, state, and local law. In the event of a change in existing law as it pertains to the services promised herein, Terminix reserves the right to revise the annual extension charge or terminate this agreement."

A bare statement in the bond that Terminix adheres to the requirements of any federal law applicable to its services simply does not show that the parties contemplated that the bond would involve substantial interstate activity in any way. Unlike the contractual provisions in *Bennish*, *supra*, it certainly does not put the plaintiffs on notice of the likelihood of substantial interstate activity. Moreover, Gwin's statement that he wished to go with a "national" company is not evidence that he contemplated anything; that statement merely reflects a desire on Gwin's part to receive the added security that many people associate with a large, national company. Finally, the *performance* of the bond obligations did not involve interstate commerce to such a degree that the parties upon entering the contract must have contemplated substantial interstate activity. Although some materials used in fulfilling the bond obligations may have come from out-of-state suppliers, this is not analogous to those situations—such as the aforementioned construction contracts involving large projects, or contracts for personal services—where the interstate activity involved in the performance of the contract is so great that it cannot reasonably be said that the parties failed to contemplate substantial interstate activity when they entered into the contract. See *Terminix Int'l Co. v. Jackson*, [Ms. 1911842, Aug. 13, 1993] —— So. 2d ——(Ala. 1993).

For the foregoing reasons, the judgment of the trial court is due to be affirmed.

AFFIRMED.

Houston, Steagall, and Ingram, JJ., concur.

Kennedy, J., concurs in the result.

APPENDIX B

THE CIRCUIT COURT OF BALDWIN COUNTY

Case No. CV 91-796

G. MICHAEL DOBSON, *et al.*

vs.

THE TERMINIX INTERNATIONAL CO., *et al.*

Motion for order compelling arbitration and for order of stay pending arbitration is denied.

/s/ James H. Reid
Judge

APPENDIX C

IN THE SUPREME COURT OF ALABAMA
SEPTEMBER 24, 1993

1920473

ALLIED-BRUCE TERMINIX COMPANIES, INC., *et al.*

v.

G. MICHAEL DOBSON, WANDA C. DOBSON,
STEVEN GWIN, and JAN GWIN,

(Baldwin: CV-91-796)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

ALMON J.—Houston, Steagall, Kennedy and Ingram, JJ., concur.